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IN RE CHEN JIE; PETITIONER

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[PETITION NO: KCH-18-36-9-2014]
26 DECEMBER 2014
B [2015] CLJ JT(5)

LEGAL PROFESSION: *Petition – Admission – Admission as advocate of High Court in Sarawak – Petition by non-citizen – Whether having 'Sarawak connection' – Domicile – Whether having abandoned domicile of origin – Whether had chosen Sarawak as present domicile – Advocates Ordinance (Cap 110) (Sarawak), ss. 2, 4(1), (2) – Compliance*

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In this petition for admission as an advocate of the High Court in Sarawak, a question arose as to whether the petitioner, a non-citizen – *albeit* one who had married a Sarawakian and taken up residence in Sarawak – could be
D admitted to the Roll of Advocates and allowed to practice law in Sarawak. Before the judge, both the Advocates' Association of Sarawak and the State Attorney General, in objection, sought to persuade the court to dismiss the petition, arguing, principally, that the same was stymied by the petitioner's nationality (being a citizen of the People's Republic of China) and his
E inability in law to adopt the domicile of his wife. The petitioner argued in retort however that the petition ought to be allowed as he had the necessary 'Sarawak connection' as spelt out in ss. 2, 4(1) and 4(2) of the Advocates Ordinance (Cap 110) (Sarawak) ('the Ordinance'), and further that, he had shown clear resolve to abandon his domicile of origin in favour of his
F domicile of choice, Sarawak.

Held (allowing petition conditionally; admitting petitioner to Roll of Advocates):

(1) Although the right to practice as an advocate in the High Court in
G Sarawak is an exclusive right reserved to those deemed fit by the Ordinance, the Ordinance itself provides the Chief Judge of Sabah and Sarawak with the discretion to not only admit a Sarawakian to do so but a non-Sarawakian as well. This is implied by the provisions of ss. 4(1) and 4(2) of the Ordinance read with s. 2 thereof, which allowed those
H with a Sarawak connection, not by birth but through domicile and residence, to be admitted as an advocate of the High Court in Sarawak. (para 11)

(2) The court's conscience is clear that the petitioner was genuine in his desire to reside permanently in Kuching and to practice as an advocate
I there, and that the petitioner had chosen Sarawak as his present domicile. From the long period of his residence in Kuching (ever since his marriage in 2004), coupled with the purchase of a property that he

had transacted jointly with his wife, the petitioner had clearly satisfied the requirement of domicile under s. 2(2)(c) of the Ordinance, and therefore had the 'Sarawak connection' to be admitted to the Roll of Advocates, Sarawak. (para 8)

(3) The petitioner is to be admitted as an advocate of the High Court in Sarawak upon payment of the prescribed fees under the Ordinance. However, to allay the fears of the objectors, the admission is made conditional upon the petitioner maintaining both his Sarawak connection through his marriage and his domicile in Sarawak, and that if he loses either one or both, the Association and the State Attorney General shall be at liberty to move a motion to have him disbarred. (para 9)

Case(s) referred to:
Melvin Lee Campell v. Amy ak Edward Sumek [1988] 2 MLJ 338 ***(refd)***

Legislation referred to:
Advocates Ordinance (Cap 110) (Sarawak), ss. 2(2)(c), 4(1), (1A)(a), (2)
Land Code (Cap 81) (Sarawak), s. 13E(2)(c)

For the petitioner - Chan Kay Poh; M/s Chan and Chan Advocs
For the State Attorney General - Dayang Jamillah Tun Salahuddin
For the Sarawak Advocates Association - Adrian Chew (Desmond Sahathevan with him); M/s Battenberg & Talma Advocs

Reported by Wan Sharif Ahmad

JUDGMENT

Rhodzariah Bujang J:

[1] The legal profession in Sarawak is by legislative intent designed to be a close profession for the rather stringent provisions governing the admission of an advocate to practice in the State in the Advocates Ordinance, the primary legislation regulating the same. The first provision is s. 4(1) which says as follows:

> 4(1) No person shall be admitted as an advocate unless:
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> (a) he is a member of the Bar of England, Scotland, Northern Ireland or the Republic of Ireland;
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> (b) he is a solicitor or attorney of a Supreme Court in a British Possession to which the Colonial Solicitors Acts 1900, the Solicitors Act, 1932, or the Solicitors Act, 1957, has been applied by Order in Council and who by virtue of any of the said Acts and of any Order in Council thereunder may be admitted as a Solicitor of the Supreme Court in England, Scotland, Northern Ireland or the Republic of Ireland without examination and without service of articles of clerkship;

A (c) he is a solicitor of the Supreme Court in England, Northern Ireland or the Republic of Ireland or he is a Writer to the Signet, Solicitor to the Supreme Court or a Solicitor in Scotland;

(cc) he has Sarawak connections and is a person upon whom the University of Singapore has conferred the degree of Bachelor of
B Laws of the University and who has been a pupil, or read in the chambers, of the State Attorney-General, or of an advocate who has been lawfully practising in some part of Malaysia for a period of not less than five years immediately prior to the person becoming his pupil or commencing to read in his chambers, for a period:

C (i) of not less than twelve months; or

(ii) if he has obtained a certificate from the University of Singapore that he has satisfactorily completed a post-graduate course of instruction in law organized by the University, of not less than six months;

D (d) he has been admitted to practise as a legal practitioner (by whatever name called) by a Supreme Court or High Court exercising jurisdiction in any place within any territory within the Commonwealth.

[2] Then, under s. 4(1A)(a) thereof a lawyer desirous of being so admitted
E must serve a period of pupillage for at least 12 months under a master who has at least five years practice in Malaysia. However, all that is still not sufficient to entitle a petitioner to be so admitted. He has to satisfy the Chief Judge of Sabah and Sarawak, previously known as the Chief Justice of Borneo if he falls under the three sub-paragraphs of s. 4(2) which provides as follows:

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4(2) A person having any of the qualifications mentioned in subsection (1) shall be eligible to be admitted as an advocate if he satisfies the Chief Justice:

(a) that at the date of his application he is not disbarred, struck off (other than on his own application), suspended or in any other
G manner disentitled to practise as an advocate or legal practitioner, by whatsoever name and style designated, in any territory within the Commonwealth and is not subject to any present or pending disciplinary proceedings in connection with his practice as an advocate or legal practitioner and has not been convicted in and is
H not subject to any pending or present criminal proceedings involving dishonesty in any territory within the Commonwealth;

(b) that he is not an undischarged bankrupt or the subject of any bankruptcy proceedings within the Commonwealth; and

(c) that:
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(i) he has Sarawak connections;

(ii) he has been normally resident in Sarawak for the period of six months immediately preceding the date of his application under section 5; or

(iii) at the date of his application to be admitted as an advocate he is normally resident and lawfully in practice in Sabah or Brunei and:

(a) he was so resident and in practice immediately prior to the 31st December, 1959; or

(b) he has been so resident and in practice for a period of not less than eighteen months immediately preceding the date of his application.

[3] Section 2(2) further defines what it means by a "Sarawak connection" and these are lawyers who:

(a) has been born in Sarawak;

(b) has been ordinarily resident in Sarawak for a continuous period of five years or more; or

(c) satisfies the Chief Justice that he is, at the time when the question whether he has Sarawak connections is relevant, domiciled in Sarawak.

[4] The petitioner in this case was born on 23 October 1980. He is a qualified lawyer, having obtained his Bachelor of Laws degree on 10 December 2012 from Queensland University of Technology, Brisbane, Australia and a certificate of eligibility after successfully completing his Legal Practice Course from the same university and by reason thereof was admitted to practice by the Supreme Court of Queensland, Brisbane. On 22 March 2013 he was awarded a Graduate Diploma in Legal Practice and has chambered in the firm of Chan & Chan Advocate for the requisite period of pupillage under Mr Chan Kay Poh, a senior member on the Roll of Advocates, Sarawak. He has filed this petition to be admitted to the said Roll but which petition is vehemently opposed by both the State Attorney General's Chambers as well as the Advocates' Association of Sarawak on the ground of nationality – the petitioner is a citizen of China but was, on 23 September 2004 married to a Sarawakian, Chan Choon Li. They have since that marriage been staying in Kuching except when he worked for 11 months in Kuala Lumpur as a consultant, the two years and eight months he took to obtain his legal qualification in Australia and of course when going for holidays abroad as well as to visit his parents in China. So he has been, according to his petition, ordinarily resident in Kuching for an aggregate period of six years since his marriage and has been granted a Long Term Visit Pass (Multiple Entry Visa) by the Immigration Department, Kuching on 19 May 2014 as well as a Professional Work Permit on 22 July 2014 by the same department. The petitioner had also, with the help of his wife purchased a residential apartment in Kuching on 23 June 2014. Thus, his counsel submitted the petitioner has satisfied all the legal requirements for an admission as an advocate of the High Court in Sarawak from not just his qualification but the Sarawak connection from his marriage and his choice of domicile.

A **The Objections**

[5] That is not so, said Mr Adrian Chew for the Association. The petitioner he said cannot adopt his wife's domicile though under common law, his wife can adopt his and his connection to the State is still tenuous and uncertain. He has not been granted a permanent resident status and his long
B term visit visa has to be renewed every two years. Mr Adrian Chew further submitted that there is no clear intention shown by the petitioner to abandon his domicile of origin and questioned if he is able to properly discharge his duty to the court and to his client if his stay here is not guaranteed. He also voiced the fear of the Association that a decision in petitioner's favour would
C open the floodgates for others to practice law here as well.

[6] Puan Dayang Jamillah bin Tun Salahuddin for the State Attorney General in turn urged that I ignore the evidence of purchase of the apartment because under s. 13E(2)(c) of the Land Code (Sarawak) (Cap 81), read with a Gazette Notification made thereunder dated 13 September 2013 numbered
D LN 148 and described as Land (Market Value of Property for Foreign Acquisition (Amendment) Direction, 2013 (its predecessor was LN 114 of 1998) a foreigner can only buy land for residential purpose if the value is RM350,000 (the property in this case was only bought for RM270,000). Mr Chan Kay Poh was quick to counter that what was purchased by the
E petitioner and his wife was an apartment in a building and the applicable provision is s. 13E(2)(b) ie, "individual parcels within a building which has been sub-divided pursuant to the Strata Titles Ordinance 1995 (Cap 18), or the former Strata Titles Ordinance, 1974 (Ordinance No 3/74)".

[7] When I examined the two Gazette Notifications it is obviously
F intended, as the said s. 13E(2)(c) clearly provides and that it is meant for that paragraph of the sub section alone and that is land with a building thereon for a residential purpose and thus by its express wordings, an apartment in a building is excluded. On the issue of domicile, there is of course such a concept in law as a domicile of origin and a domicile of choice and that the
G latter can be acquired. Mr Chan Kay Poh has quoted Suriyadi Halim Omar J (as His Lordship then was) in *Ang Geck Choo (p) v. Wong Tiaw Yong* [1997] who in turn quoted from Tan Chiaw Thong J in *Melvin Lee Campell v. Amy ak Edward Sumek* [1988] 2 MLJ 338 on this issue as follows:

> There are two essential elements involved in determining the domicile of
H choice, and these are the factors of residence and the requisite intention to reside permanently for an indeterminate period in the country where it is alleged that the petitioner has adopted the domicile of choice.
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> In this instances, it is to be noted that paragraph 434 of *Halsbury's Laws of England* (4th Ed.) states as follows:
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> > 434. Direct and secondary evidence of intention. Direct evidence of intention is often not available, but a person whose domicile is in question may himself give evidence of his intentions, present of past ...

> It takes two forms - domicile of origin and domicile of choice. A classic description of the concept is to be found in Lord Wesbury's speech in *Udny v. Udny*. Two features of his description are of particular importance in the present case.
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> First, that the domicile of origin prevails in the absence of a domicile of choice, i.e. if a domicile of choice has never been acquired or, if once acquired, has been abandoned.
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> Secondly, that a domicile of choice is acquired when a man fixes voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for unlimited time.

[8] The conscience of court, said His Lordship further must be satisfied that the domicile of origin had been abandoned and that of choice acquired. As I have said, in my ruling delivered on 19 May 2014 when refusing the petitioner's application for three months exemption from his pupillage period of 12 months, I have no doubt and my conscience is clear that the petitioner is genuine in his desire to reside permanently in Kuching and to practice as an advocate here. I was constrained at that time to dismiss his petition because at that material time he was yet to be given a Professional Pass by the Immigration Department and for the record the stand taken by Mr Leonard Shim (now President of the Advocates' Association of Sarawak) appearing for the Association then, was that the Association would not object to his application (for admission) if he has been granted such a Pass by the Immigration Department. Whilst I do not hold it against him or the Association for the change of heart, I would not go back on any words that I believe, and the contrary was not shown, that the petitioner has chosen Sarawak as his present domicile. This I say from his long period of residence in Kuching since his marriage and which is now cemented by the purchase of the property. The petitioner has thus satisfied the requirement of domicile under s. 2(2)(c) of the Ordinance and therefore has the Sarawak connection to be admitted to the Roll of Advocates.

[9] However, despite holding this view, I do agree with Mr Adrian Chew that his connection to the State, by his marriage and his intention to reside are tenuous factors. Though I am sure both his objectors share my wish that the marriage be a long lasting one and that the petitioner would not abandon Sarawak as a place to reside and earn his living as a lawyer, nonetheless practical considerations and the realities of life dictate that these links to the State must be factored in my decision. In that regard I have been given an assurance by Mr Desmond Sahathevan, also appearing for the Association at the hearing of the petition that although an admission to the Roll of Advocates is for life, a member can, for good reasons be struck off the said Roll. Therein, in my view, lies the answer to the Association's fear – ie, that I would admit the petitioner as an advocate of the High Court in Sarawak upon payment of the prescribed fees under the Ordinance but it is conditional upon him maintaining both his Sarawak connection through his marriage and

A his domicile here. If he loses either one or both, the Association who is tasked to oversee the legal profession in Sarawak or the State Attorney General can move a motion to have him disbarred.

[10] As for the fear of opening the floodgate, I do not in all honesty see hordes of foreigners readying themselves to come and practice law here. Besides, each case must be decided on its own merits and as Suriyadi J had said in the case cited, the burden would be on the person asserting the change to prove the abandonment and acquisition of a domicile.

[11] Even though I did say at the beginning of this judgment, though in different words that the right to practice as an advocate in the High Court in Sarawak is an exclusive right reserved to those deemed fit by the Ordinance, nevertheless, the Ordinance itself provides the Chief Judge of Sabah and Sarawak, upon whose instruction I heard this petition, with the discretion to not only admit Sarawakians to do so but non-Sarawakians as well. This is implied by the earlier quoted provisions allowing those with a Sarawak connection, not by birth but through domicile and residence as the other two criteria for admission. In other words, the right to so practice is conferred and not granted as of right.

[12] In allowing the petition, I am fully conscious of the fact that I have taken an oath of office to uphold the Federal Constitution which, amongst others, provide certain guarantees to the special positions of Sabah and Sarawak, in terms of control over immigration and the administration of justice – thus the courts in Sabah and Sarawak have their own Chief Judge. But in making this decision I do not think I am committing a sacrilege against that oath or doing an injustice to my fellow Sarawakians – the injustice would be not to give due recognition to the deserving spouses of my fellow Sarawakian women of the right to earn a living by practising as an advocate in our courts. Thus, the petition is granted on the condition stipulated earlier and the petitioner is to be admitted and enrolled as an advocate of the High Court in Sarawak upon payment of the prescribed fees.